**APPENDIX A**

IN THE SUPREME COURT OF THE
STATE OF OREGON

State of Oregon,
Respondent,
v.

Otto W. Cahill,
Appellant.

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Appeal from Circuit Court, Polk County
William W. Wells, Judge.
Argued and submitted September 15, 1955

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PETITION
FOR
REHEARING

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The Appellant respectfully petitions the Court for a rehearing in the within and above entitled case, and hereinafter sets forth, without argument, wherein it is claimed that the Court erred in the Majority Opinion filed in the above entitled Court January 25, 1956.

Error No. 1.

The Court erred in failing to hold that the indictment in the instant case, "when taken by its four corners," was clear and unambiguous, and that it charged the commission of only one offense, namely, that the Defendant, on the first day of February, 1954, in Lincoln County, Oregon, did then and there have in his possession

the sum of $750.00, the money of the Taft-Nelscott-DeLake Water District, and that he did, at said time and place, unlawfully and feloniously neglect and refuse to pay over said sum of money as required by law, or when lawfully demanded so to do.

Error No. 2.

The Court erred in holding, in effect, that said indictment charged more than one offense and that in order to avoid having to defend against two separate and distinct charges it was incumbent upon Defendant to move that the State be required to elect as between (a) simple conversion, and (b) statutory conversion or larceny by neglecting and refusing to pay over or deliver said sum of $750.00 as required by law, or when lawfully demanded so to do by said Water District.

Error No. 3.

The Court erred in holding that exhibit 31, a photostatic copy of a portion of the budget report, was properly admissible in evidence.

Error No. 4.

The Court erred in failing to hold that the evidence in this case, taken as a whole, is subject to only one reasonable interpretation, and no other, to wit:

The Water District turned over the sum of $750.00 to the Defendant in his individual capacity as a disabled war veteran; and that this was done pursuant to a plan, or scheme, by which it was sought, by all parties, to

obtain for said Water District an advantage (by way of low price) to which it was not lawfully entitled under Government Regulations; the scheme being that whereas the Defendant, as a veteran, was a qualified purchaser at War Surplus Sales, and whereas the Water District was not such favored individual and could not purchase at such War Surplus Sales, either directly or through an agent, it was decided that the Water District should advance to the Defendant the sum of $750.00, with which he could purchase, or option, as a qualified purchaser—war veteran—and probably at a mere fraction of its true market value, and without financial risk to himself, equipment needed by the corporation.

Error No. 5.

The Court erred in failing to hold that in view of the fact that the said money advanced by the Water District to the Defendant was to be used, if opportunity came, to enable him, without financial risk to himself, to become the purchaser of Army Surplus material, purchasable by him as a veteran but not purchasable by the Water District itself, either directly or by agent, and the title and true ownership of which would be in the Defendant until legally transfered by him to the Water District, that said money was not, and could not be, a trust fund, but became the Defendant's own money, which he was under agreement, or contract to repay, either in cash or by transfer of equipment (War Surplus equipment) needed by the Water District.

Error No. 6.

The Court erred in that it decided a case or controversy that was entirely foreign to the single charge clearly made by the indictment; and, in effect, ignored the only issues, two in number, to be determined under the indictment; and the only issues in the minds of the trial court and counsel at the trial; and the only issues submitted to the jury, namely:

(a) DID THE DEFENDANT, ON OR ABOUT FEBRUARY 1, 1954, HAVE IN HIS POSSESSION THE SUM OF $750.00 BELONGING TO THE TAFT-NELSCOTT-DELAKE WATER DISTRICT? AND (b) DID HE, THE DEFENDANT, ON OR ABOUT THAT DATE, NEGLECT OR REFUSE TO PAY OVER OR DELIVER ANY PORTION THEREOF AS REQUIRED BY LAW, OR WHEN LAWFULLY DEMANDED SO TO DO?

Error No. 7.

The Court erred in failing to hold that in order to be entitled to a verdict of "guilty" under this indictment it was incumbent upon the State to prove, beyond a reasonable doubt, that on or about February 1, 1954, in Lincoln County, Oregon, the Defendant had in his possession the sum of $750.00, which then and there belonged to the Water District; and also to prove that at the said time and place Defendant did neglect or refuse to pay over or deliver all or some portion thereof as required by law or when lawfully demanded so to do.

Error No. 8.

The Court erred in holding, in effect, that the provision of Article VII, § 3 of the Constitution of Oregon authorizing "affirmance notwithstanding error" permits the Supreme Court to disregard errors of the trial court improperly admitting material or possibly prejudicial evidence and authorizing the Court to exercise its own judgment and beliefs as to how the case should have been decided in the trial court; and the Court erred in failing to hold that to place such a construction, or interpretation upon said provision of our State Constitution renders that provision of our State Constitution (as now construed by our Supreme Court in this and some former decisions) VOID, as in contravention of the SIXTH AMENDMENT of the Constitution of the United States.

Error No. 9.

The Court erred in failing to hold that the State had failed to prove the Defendant guilty of the crime charged in the indictment or any other crime; and in failing to direct the dismissal of the case.

Respectfully submitted,

Harry G. Hoy,
of Attorneys for Appellant.

**APPENDIX B**

## POINT NO. 3

If our Oregon Constitution, Article VII, § 3, is to be construed, as this Majority Opinion apparently holds, to-wit, that our State Supreme Court has a right to disregard error in the admission of evidence relating to a material issue in the case, and to decide a case the way the Court feels that it should have been decided, and regardless of whether, in the opinion of the Court, the jury reached a correct verdict, then that provision of our Constitution is violative of the fundamental law of the United States, which guarantees to every person accused of crime a trial by an impartial jury.

## AUTHORITIES ON POINT NO. 3

Constitutional provisions applicable:

Constitution of the United States, Article III, § 2.
Amendment VI, United States Constitution.

What is meant by "trial by jury" as used in the above numbered Constitutional provisions?

Forrest v. Portland Ry. L. & P. Co., 64 Or. 240 (Section 3, p. 246).
State v. Rader, 62 Or. 37 (41 Sec. 5).
Oregon R. & N. Co. v. Taffe, 67 Or. 112 (116).
Boatright v. Portland Ry. L. & P. Co., 68 Or. 35 (Sec. 5).

## ARGUMENT ON POINT NO. 3

Various courts have defined with more or less particularity the meaning of the term "trial by jury" as

that expression is used in Constitutional provisions designed to preserve that desirable right to each of us; but one of the clearest definitions (and very pertinent to this case) has been furnished by our own late Justice GEORGE H. BURNETT in the case of *Forrest v. Portland Ry. L. & P. Co.*, at pages 64-65 of 64 Ore. Reports. He there explains that this verdict of a trial by jury referred to in Constitutional provisions,

> "* * * is not any and every decision that may be reached by a body of 12 men who happen to sit in a jury box and hear the testimony in the presence of a court, but it means one reached under the forms of law as prescribed for a jury trial within the meaning of the Constitution from the beginning. In State v. Rader, 62 Or. 37, Mr. Justice McBride in construing this section said:
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> " 'But for the jury to find the fact the court must see that they receive only legal evidence and no good finding of fact can ever be predicated upon illegal evidence.'
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> "It is equally true that the supression of legal evidence will vitiate a verdict. An invulnerable verdict must be a conclusion of fact by a jury regularly impaneled, as the result of a trial in which the rights of all parties in respect to the admission or exclusion of testimony have been observed in all material particulars under proper instructions of the court as to the law. By so much as the elements of this standard were wanting, namely, by the exclusion of competent testimony offered by the defendant, the procedure culminating in the decision of the jury in this case fell short of the *trial by jury* which the Constitution says shall be preserved."

The Majority Opinion in this case denies to the Petitioner here the right of a trial by jury according to the

true meaning of that term as used in the SIXTH AMENDMENT of the Constitution of the United States. In so doing the Court places a construction upon the provision of Article VII, § 3, of the Constitution of Oregon that renders that provisions repugant to the SIXTH AMENDMENT of the Constitution of the United States.

That the writer of the Majority Opinion, himself, had doubts as to the constitutionality of this provision in our Constitution, as some of our learned judges construe it, is indicated by a "whistling-in-the-dark" comment found on page 163 of the Oregon Advance Sheets, dated February 8, 1956 (No. 3 of Vol. 62, OAS), to-wit *"Surely it will not be argued that Article VII, § 3 of the Constitution is unconstitutional."*

We should all of us be everlastingly grateful and thankful that the Constitution of the United States, our revered, fundamental law, does not permit any substitute for a "trial by an impartial jury". We *are* truly thankful that we need not accept as a substitute for a trial by a jury (12 of our peers), trial by six learned judges; and our trial by a jury of 12 of our peers must be presided over by a judge who permits only admissable evidence on any material issue and excludes no proper evidence offered.

This argument on Point No. 3 corresponds to the dissenting opinion of Justice Tooze; but we have added thereto the Federal question. If our Supreme Court definitely establishes the construction of Art. VII, § 3

in accordance with the Majority Opinion that construction is binding on the world, including the Supreme Court of the United States, which then should declare that provision void.